Supreme Court, U.S.
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No. 99-1515

IN THE

Supreme Court of the United States

MRO COMMUNICATIONS, INC.,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
NOW AT&T CORP.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AT&T CORP. IN OPPOSITION

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QUESTION PRESENTED

Whether the award of attorneys' fees to AT&T Corp. ("AT&T") pursuant to Fed. R. Civ. P. 54(d) in accordance with Nevada state law was proper, after MRO Communications, Inc. ("MRO") rejected AT&T's offer for judgment and judgment was entered in AT&T's favor on all claims?

STATEMENT REQUIRED BY RULE 29.6

AT&T has no parent company. No publicly held company owns 10 percent or more of AT&T's stock.

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BRIEF OF AT&T CORP. IN OPPOSITION

STATEMENT OF THE CASE

On August 3, 1998, following the conclusion of lengthy proceedings in this action that resulted in judgment for AT&T on all 28 claims asserted by MRO, the district court granted AT&T's motion for attorneys' fees pursuant to Fed. R. Civ. P. 54(d), in the amount of $2,009,844.89. The fees AT&T sought were exclusively those incurred in defending itself against MRO's state law claims, and only for the time period that followed MRO's rejection of AT&T's offer of judgment for $100,000. (Pet. App. at 2a-3a.)

In May 1989, MRO entered into a Billing Services Agreement ("BSA") with AT&T, pursuant to which AT&T agreed to provide MRO with billing and collection services for calls made to MRO's 900 number programs over AT&T's network. On July 23, 1993, MRO commenced this action with an eight-count complaint. On February 8, 1995, MRO filed a First Amended and Supplemental Complaint, asserting 28 claims, including state law claims for breach of contract and various tort claims, as well as several claims under federal law. (*See* Pet. App. at 2a-4a.)

On June 3, 1996, AT&T made a $100,000 offer of judgment. (Pet. App. at 24a-27a.) MRO did not accept AT&T's offer. Instead, MRO pursued the case to trial nearly two years later, which resulted in the district court ultimately granting AT&T's motion for judgment as a matter of law. (*See id.* at 4a.)

On May 31, 1998, AT&T filed a motion for attorneys' fees pursuant to Fed. R. Civ. P. 54(d)(2) and Local Rule 54-16 of the United States District Court for the District of Nevada. AT&T's motion sought fees only for the work directly related to AT&T's defense of MRO's state law claims, rested exclusively upon applicable state law, and sought only those fees incurred after MRO rejected AT&T's offer of judgment. In the period following the offer of judgment, AT&T had incurred more than $3 million in legal fees and expenses. However, AT&T deducted all fees arguably related to the defense of MRO's federal statutory claims. (*See* Pet. App. at 4a-5a.) Numerous state law claims were pending at the time of trial. MRO did not challenge the reasonableness or the amount of the fees.

THE DECISIONS BELOW

On August 3, 1998, the district court granted AT&T's motion for attorneys' fees. Although AT&T's motion was filed

pursuant to Fed. R. Civ. P. 54(d)(2), the district court properly relied upon the substantive law of Nevada in ruling that AT&T's fees were authorized and were reasonable, noting that "[a]lthough the fees requested are substantial, so was the litigation which spawned them." (Pet. App. at 18a.) The Ninth Circuit affirmed the award, properly concluding that the district court did not abuse its discretion in awarding attorneys' fees to AT&T. (*Id.* at 1a-16a.)

Petitioner's entire argument in the Ninth Circuit, as well as in its petition here, is that Fed. R. Civ. P. 68, rather than state law, governs the propriety of an award of attorneys' fees in this case. The Ninth Circuit properly rejected that analysis. Where there is no conflicting federal rule, and the claims in federal court are state law claims, state law will govern those state law claims. Because AT&T was in federal court, however, it did have to comply with federal procedural law that governs how offers of judgment are to be made, and under what circumstances attorneys' fees may be awarded.

As the Ninth Circuit explained, "Federal Rule 68 sets forth the *procedure* that must be followed in a federal district court to make an offer of judgment," and thus AT&T had to follow that procedure in federal court. (Pet. App. at 5a (emphasis added).) As that court correctly noted, AT&T's Rule 68 offer of judgment by its terms meant that if MRO did not accept the offer of judgment, and did not recover more than that amount, then MRO "must pay the costs incurred after the making of the offer." (Pet. App. at 6a.)

The Ninth Circuit then determined the substantive law – what constituted "costs" under AT&T's offer of judgment. Finding that attorneys' fees may be included as costs where authorized by a "relevant substantive statute or other authority," the Ninth Circuit noted that no federal authority provided for the recovery of attorneys' fees. The Court properly followed this Court's ruling in *Delta Airlines, Inc. v. August*,

450 U.S. 346, 352-54, 101 S.Ct. 1146, 1150-51 (1981), which held that when the defendant prevails in a federal case and the plaintiff recovers nothing – as happened here – Rule 68 is inapplicable. (*See* Pet. App. at 7a.)

The Ninth Circuit turned to the applicable Rule under which AT&T moved, Fed. R. Civ. P. 54(d)(2), to analyze whether AT&T was entitled to recover its attorneys' fees. (Pet. App. at 7a.) The Ninth Circuit correctly observed that Rule 54(d)(2) expressly authorizes a district court to award attorneys' fees where, as is the case, there is an "independent source of authority" to make such an award. (Pet. App. at 8a.)

The Ninth Circuit observed that "where a district court is exercising its subject matter jurisdiction over a state law claim, so long as 'state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorneys' fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." (*Id.* (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 260-61, 95 S.Ct. 1612, 1623 (1975)).) Given that there was no controlling or conflicting federal rule, and because this action was brought in federal court in Nevada, reference to Nevada state law was required. The Ninth Circuit held that under the applicable Nevada state offer of judgment rule, "a defendant shall be awarded reasonable attorneys' fees incurred from the time of an offer of judgment if the plaintiff rejects it and fails to receive a more favorable result." (Pet. App. at 9a.)[1]

The Ninth Circuit carefully reviewed Nevada state law governing offers of judgment and properly held that nothing

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[1] The Nevada Supreme Court has held that Nevada's offer of judgment rule applies to judgments entered against the offeree. (*Id.* at 10a (citing *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983)).)

under Nevada law "prescribe[d] the procedure that should be followed in a *federal* court in making an offer of judgment. The only procedure for notifying a plaintiff of an offer of judgment in federal court is set forth in Federal Rule 68. AT&T followed that procedure." (Pet. App. at 12a (emphasis in original).) The Ninth Circuit aptly observed that MRO would have been liable for attorneys' fees had it brought its case in Nevada state court, and therefore, it "would be unjust and a violation of national policy described in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), to reach a different result here simply because the forum is federal." (Pet. App. at 13a.)

REASONS FOR DENYING THE PETITION

MRO asserts that this Court should grant its petition to establish that the holding in *Delta Airlines* applies equally to federal and state claims brought in federal court. According to MRO, because many cases in federal court may involve state law claims based on a district court's supplemental jurisdiction, there will be "confusion" if rules differ depending on whether offers of judgment apply to federal claims or to state claims. (Pet. at 8.) MRO asserts that this Court must reverse the Ninth Circuit's award of attorneys' fees under Nevada state law in order to ensure "uniformity" under Federal Rule 68. (*Id.*)

In essence, MRO asks this Court to reverse *Erie* because the Ninth Circuit's ruling is simply a straightforward application of *Erie*. It is axiomatic that the federal rules are procedural, and are not meant to trump important state interests where state law claims are brought in federal courts under either diversity or supplemental jurisdiction. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 n.7, 116 S.Ct. 2211, 2220 n.7 (1996) (noting that "[f]ederal courts have interpreted the Federal Rules, however, with sensitivity

to important state interests and regulatory policies," such as to situations where state offer of judgment rules may apply when not in conflict with the Federal Rules). AT&T originally made its offer of judgment under Federal Rule 68, because, as the Ninth Circuit aptly observed, it was the only procedural mechanism for making an offer of judgment in federal court. (Pet. App. at 5a.)

Once judgment was granted to AT&T, under *Delta Airlines*, Rule 68 became inapplicable because the defendant was granted judgment. However, a prevailing defendant may nevertheless move to recover its costs as a prevailing party under Fed. R. Civ. P. 54(d). *See Delta Airlines*, 450 U.S. at 354, 101 S.Ct. at 1151 (Rule 68 "does not apply to judgments in favor of the defendant or to judgments in favor of a plaintiff for an amount greater than the settlement offer. In both of those extreme situations, the trial judge retains his Rule 54(d) discretion."). Under Rule 54(d)(2), a prevailing defendant may seek to recover attorneys' fees incurred in defending itself against state law claims where the substantive state law specifically authorizes such a recovery. That result is required both under *Erie* and the Rules of Decision Act, 28 U.S.C. § 1652.[2] That is precisely what AT&T did below, and its motion sought only the attorneys' fees that AT&T incurred in defending itself against MRO's state law claims.

As is mandated by Rule 54(d)(2), the Ninth Circuit properly looked to the substantive law authorizing the award of attorneys' fees with respect to the state law claims: the law of the forum state, here Nevada. The Ninth Circuit properly determined that Nevada's offer of judgment rule provided for

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[2] Section 1652 provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

the recovery of attorneys' fees where, like AT&T in this case, a defendant prevailed *in toto* at trial and the plaintiff had unreasonably rejected defendant's offer of judgment.

The Ninth Circuit correctly followed *Delta Airlines* in holding that Federal Rule 68 does not "encompass a judgment against the offeree" (Pet. App. at 10a) and thus its mandate (to impose costs on a plaintiff) has no application because judgment was entered against the offeree, MRO. Because there was no applicable countervailing federal rule, Rule 54 as well as *Erie* pointed the trial court to state law. *See, e.g., Gasperini*, 518 U.S. at 428 n.7, 116 S.Ct. at 2220 n.7 (citing with approval the Seventh Circuit's holding in *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist.*, 60 F.3d 305 (7th Cir.), *cert. denied*, 516 U.S. 1010 (1995), that a "state provision for offers of settlement by plaintiffs is compatible with Federal Rule 68, which is limited to offers by defendants"); *Tanker Management, Inc. v. Brunson, M.D.*, 918 F.2d 1524, 1529-30 (11th Cir. 1990) (holding that because Rule 68 does not apply where defendant prevails, in diversity action under *Erie* it is proper to consider state offer of judgment rule that awarded attorneys' fees to prevailing defendant); *Ganapolsky v. Keltron Corp.*, 823 F.2d 700, 701-02 (1st Cir. 1987) (upholding award of attorneys' fees under state offer of judgment rule after suit had been dismissed and judgment rendered in defendants' favor, noting *Delta Airlines* did not apply).[3] The

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[3] MRO erroneously contends that the Ninth Circuit's opinion "reject[ed]" the holding of *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136 (1965), wherein this Court held that Fed. R. Civ. P. 4(d)(1) is a procedural rule that applies in diversity actions over state law under the Rules Enabling Act. (Pet. at 7-8.) *Hanna* is inapposite for the simple reason that this Court held in *Delta Airlines* that Rule 68 does *not* apply to any cases in which judgment is rendered against the offeree, whereas in *Hanna* the Court held that Rule 4 applies in all diversity cases filed in federal courts. Only if this Court had ruled differently in *Delta Airlines* and held that Rule 68 applied to prevailing defendants would *Hanna* control.

kind of uniformity sought by MRO is necessarily frustrated by the *Erie* doctrine, which requires that federal courts turn to the laws of the states. In this case, the Ninth Circuit employed the well-established law set forth by this Court in *Delta Airlines* and *Erie* in applying state offer of judgment rules to state law claims where Rule 68 is inapplicable – which itself sets forth a uniform approach.[4]

Moreover, the rule properly applied by all of the circuit courts that have considered this issue is aimed at avoiding forum-shopping, one of the ills recognized by this Court in *Erie*. *See* Pet. App. at 13a; *S.A. Healy Co.*, 60 F.3d at 311 (state offer of judgment statute should apply in federal court where Rule 68 was inapplicable because *Erie* goal of deterring forum-shopping would be served by applying state law). The Ninth Circuit's application of settled law in this case does not merit this Court's review.

Finally, MRO asks this Court to engage in mere error correction as to whether the Ninth Circuit properly construed Nevada's law concerning offers of judgment. (Pet. at 6, 9.) No correction is needed, however, because the Ninth Circuit's result was proper under applicable Nevada law. In the two Nevada Supreme Court decisions cited by MRO for the proposition that AT&T's offer was invalid because it did not specify any Nevada statute or rule (Pet. at 6-7 n.4 & 9), the Nevada Supreme Court was concerned with a wholly unrelated matter – the different result with respect to costs avail-

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[4] Obviously, because some states like Nevada authorize recovery of attorneys' fees when an offer of judgment has been unreasonably refused by plaintiff and judgment is entered in favor of the defendant (a situation where Rule 68 is inapplicable), and other states do not, there will not be uniformity in the result. Differing results do not mean that there is no "uniformity" in the federal courts. The material uniformity is that required by *Erie* – a uniform application of state substantive rules when there is no conflicting or controlling Federal Rule of Civil Procedure.

able under one statute but not the other. *See Ramadanis v. Stupak*, 104 Nev. 57, 59-60, 752 P.2d 767, 768 (Nev. 1988) (prejudgment interest could not be recovered where Nev. R. Civ. P. 68 did not provide for the denial of prejudgment interest when the final judgment is less favorable than the offer of judgment while Nev. Rev. Stat. § 17.115 did, and offer of judgment made under Nev. Rule 68 only); *Trustees of Carpenters For Southern Nevada Health and Welfare Trust v. Better Building Co.*, 101 Nev. 742, 710 P.2d 1379 (Nev. 1985) (because offer of judgment made only under Nev. R. Civ. P. 68, which did not provide for expert fees, and not Nev. Rev. Stat. § 17.115, which did, expert fees not available where offeree refused offer of judgment and lost). By contrast, the costs at issue here – attorneys' fees – are available under either Nevada state provision. *See Pombo v. Nevada Apartment Ass'n*, 113 Nev. 559, 562, 938 P.2d 725, 727 (Nev. 1997) (attorneys' fees available under both Nev. R. Civ. P. 68 and Nev. Rev. Stat. § 17.115).

Moreover, in neither Nevada decision did the Nevada Supreme Court suggest that an offer of judgment seeking attorneys' fees must reference the specific state statute or rule under which it was made, particularly where, as the Ninth Circuit aptly noted, MRO elected to pursue its state law claims in *federal* court. (*See* Pet. App. at 12a.) Rather, the procedure for making an offer of judgment in federal court is set forth in Rule 68, not the Nevada statutes. AT&T followed that procedure (*id.*), and MRO does not contend otherwise.

At bottom, MRO's uncertworthy petition merely asks this Court to revisit the Ninth Circuit's application of settled law to the specific facts of this case. MRO points to no split in the circuit courts below, or any other purported lack of uniformity with respect to this Court's well-established jurisprudence regarding Rule 68 and the *Erie* doctrine. There simply

is nothing set forth in MRO's petition deserving of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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